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~~MICHAEL RODAK, JR.~~, CLERK

No. 76-268

**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**TOMAS LOPEZ ALMENDAREZ, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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**ROBERT H. BORK,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.***

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Petitioner contends the district court erred in refusing to require disclosure of the identity of the informant who provided the information which led to his arrest.

After a jury-waived trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to five years' imprisonment followed by a special parole term of two years. The court of appeals affirmed (Pet. App. 7-9).

On September 28, 1975, Agent Torrez of the Drug Enforcement Administration received a telephone call from an informant who had previously proved reliable. He reported that he had just observed a large truck (which he described in detail) being loaded with marijuana (Pet. App. 8, 11-12). One of the men loading the truck was

known both to the informant and to Agent Torrez as a large-scale drug dealer (Pet. App. 12). Surveillance points were established at various places along the possible routes of the truck from the loading area near the Rio Grande River (Pet. App. 12-13).

After several hours, a truck exactly matching the informant's description appeared. The truck was stopped, more than 3,000 pounds of marijuana were discovered, and petitioner, the driver and sole occupant of the truck, was arrested (Pet. App. 8).

The district court denied petitioner's motion to disclose the identity of the informant. It held that disclosure was not required because the informant did not participate in the commission of the offense (Pet. App. 17).

The court of appeals correctly affirmed that ruling. The informant merely observed the marijuana being loaded.<sup>1</sup> Disclosure of his identity would not have been "relevant and helpful to the defense of an accused, or \* \* \* essential to a fair determination of [the] cause." *Roviaro v. United States*, 353 U.S. 53, 60-61; see also, *McCray v. Illinois*, 386 U.S. 300, 312-313.

Petitioner contends, however, that the circuits are in conflict on whether the identity of an informant must be disclosed when his information establishes probable cause. Eight circuits do not require disclosure. *United States v. Picard*, 464 F. 2d 215 (C.A. 1); *United States v. Konigsberg*, 336 F. 2d 844 (C.A. 3), certiorari denied *sub nom. Celso v. United States*, 379 U.S. 930; *United States v. Fisher*, 440 F. 2d 654 (C.A. 4); *Bourbois v. United States*, 530 F. 2d 3 (C.A. 5); *United States v. Willis*, 473 F. 2d 450 (C.A. 6), certiorari

<sup>1</sup>The informant did not mention seeing petitioner at the loading site (Pet. App. 12).

denied, 412 U.S. 908; *United States v. Edge*, 444 F. 2d 1372 (C.A. 7), certiorari denied, 404 U.S. 855; *United States v. Smith*, 462 F. 2d 456 (C.A. 8); *United States v. King*, 478 F. 2d 494, 508 (C.A. 9), certiorari denied *sub nom. Light v. United States*, 414 U.S. 846; *United States v. Mehciz*, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974; *United States v. Waters*, 461 F. 2d 248 (C.A. 10), certiorari denied *sub nom. Robins v. United States*, 409 U.S. 880; *United States v. Bell*, 506 F. 2d 207 (C.A. D.C.); *United States v. James*, 466 F. 2d 475, 477 (C.A. D.C.).

The Second Circuit has stated in dictum that, in the exercise of its supervisory authority, it will require that an informant "be produced only when his story constitutes 'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause." *Mapp v. Warden*, 531 F. 2d 1167, 1173; see also *United States v. Comissiong*, 429 F. 2d 834 (C.A. 2); *United States v. Tucker*, 380 F. 2d 206 (C.A. 2). However, that court has never so held. The court's mere dictum does not create a conflict among the circuits requiring resolution by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
Solicitor General.

NOVEMBER 1976.